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No. 89-1749

IN THE
Supreme Court of the United States
October Term, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW
YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR.,
GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T.
MCFARLAND, EDWARD M. KRESKY, AND HENRY G.
WILLIAMS, in their official capacity as Commissioners of the
Public Service Commission of the State of New York,
Petitioners,

v.

NATIONAL FUEL GAS SUPPLY CORPORATION,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

**BRIEF OF THE NATIONAL ASSOCIATION
OF REGULATORY UTILITY COMMISSIONERS
AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR CERTIORARI**

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INTEREST OF AMICUS CURIAE

The National Association of Regulatory
Utility Commissioners (NARUC) submits this
brief as amicus curiae urging that the
Petition for Certiorari filed by the Public

Service Commission of the State of New York be granted due to the harm the decision below may have upon the regulation of the environmental impact of natural gas pipeline construction by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioners and the Respondent.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands engaged in the regulation of utilities and carriers. The Public Service Commission of the State of New York and its individual commissioners, Petitioners herein (hereinafter "the NYPSC"), are members of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of

public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating natural gas companies operating within their respective jurisdictions. As such, these officials have the obligation to assure the establishment and operation of natural gas facilities which serve the public interest. This means that State regulators must, under law, seek to ensure that safe, dependable, and environmentally sound service is provided consumers at rates that are just, reasonable, and nondiscriminatory.

In the decision for which the NYPSC seeks this Court's review, the United States Court of Appeals for the Second Circuit reversed a decision of the United States District Court, Northern District of New York, which had granted the NYPSC's motion for summary judgment, thereby dismissing a complaint for declaratory ruling filed by

Respondent National Fuel Gas Supply Corporation (hereinafter "National Fuel") alleging that the NYPSC's jurisdiction to require National Fuel to comply with State law to construct an interstate gas pipeline is facially preempted.¹ In reversing the District Court, the Court of Appeals held that the jurisdiction of the NYPSC to regulate the site-specific environmental compatibility of pipeline construction projects was entirely preempted by Federal Energy Regulatory Commission (FERC) regulation of natural gas companies under the Natural Gas Act.

Although the decision of the Court of Appeals frustrates the State of New York's

¹ The decision of the Second Circuit appears at Appendix 1a of the Petition for Writ of Certiorari. This decision has been reported at 894 F.2d 571. The bench decision of the District Court, which is unreported, appears at Appendix 26a of the Petition for Writ of Certiorari. Subsequent reference will be made to these decisions as they appear therein in this form: App. at

efforts to ensure that pipeline construction is conducted in an environmentally compatible manner, the case clearly presents issues of national scope and importance. Because the Court of Appeals found State law to be facially preempted due to the "exclusive jurisdiction of the FERC", the effect of its decision will be to foreclose or sharply limit similar State regulation in every jurisdiction in the country.

Moreover, this case raises questions of first impression not squarely addressed by any other court. Accordingly, unless reviewed and reversed by this Court, the decision of the Court of Appeals will have a profound effect on States not party to this case.² Therefore, as the representative of

² The NARUC has collected information which shows that 20 State commissions in addition to the NYPSC seek to regulate the environmental impacts of the construction of natural gas transmission lines. These States include Arkansas, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, Oklahoma,

State regulatory officials in each of the States which seek to ensure environmentally sound pipeline construction, the NARUC and its member agencies are vitally interested in the outcome of this litigation.

SUMMARY OF ARGUMENT

This Court should grant the NYPSC's Petition due to the national importance of the issue raised therein, and because the decision of the Second Circuit Court of Appeals conflicts with both decisions of this Court and the views of another Court of Appeals. If left unreviewed, the decision below will directly impede the ability of the States to efficiently ensure that natural gas pipeline construction is conducted in an environmentally compatible manner. It will also sanction further

Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming. NARUC, 1987 Annual Report on Utility and Carrier Regulation at 514-523 (Washington D.C. 1988).

Federal intrusion into areas of regulatory responsibility which are properly within the lawful jurisdiction of the States.

The importance of the issues of Federal law raised in the NYPSC petition cannot be understated. In an era of increasing environmental concern and growing energy demands, these issues will recur in other States with increasing frequency as pipelines expand their transmission systems in the months and years ahead. Clearly, the Court of Appeals' holding that this entire area of environmental review is off limits to State regulators will determine the impact new pipeline construction will have on local communities.

By finding such environmentally-based State regulation to be completely preempted by the Natural Gas Act, the Court of Appeals has erroneously overstated the sweep and scope of FERC regulation of natural gas pipelines in conflict with decisions of this

Court which have recognized "Congress' decision that the interstate gas industry should be subject to a dual regulatory scheme." Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 489 U.S. ___, ___, 103 L.Ed.2d 509, 530 (1989). In addition, the one other Court of Appeals which has addressed the issue of State regulation of the environmental impact of pipeline construction, albeit in dicta, found room in the "dual regulatory scheme" for such State authority. In sum, the NYPSC petition should be granted in order to correct the errors of the court below.

ARGUMENT

I. THE COURT OF APPEALS' DECISION MUST BE REVIEWED BY THIS COURT BECAUSE THERE IS NO EVIDENCE THAT CONGRESS INTENDED TO COMPLETELY PREEMPT STATE ENVIRONMENTAL REGULATION

In dismissing National Fuel's request for declaratory relief, the District Court reviewed each of the Federal statutes which

the National Fuel alleged to be preemptive of the NYPSC's ability to regulate the environmental impact of pipeline construction in the State and concluded that in none of these enactments had Congress intended that such State regulation be completely foreclosed. App. at 29a-33a. Specifically, the Court found that neither the Natural Gas Act, 15 U.S.C. 717 et seq. (NGA), the Natural Gas Pipeline Safety Act, 49 U.S.C. 1671 et seq. (Safety Act), nor the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (NEPA), entirely displaced the NYPSC's jurisdiction under Article VII of the New York Public Service Law.³ Id. The District Court also found that no other court had squarely addressed the precise issue of preemption it confronted, but noted that in dicta, the United States Court of Appeals for the

³ N.Y. Pub. Serv. Law secs. 120-130 (McKinney 1989), reprinted at App. 48a-63a.

Eighth Circuit had found that neither the NGA or the Safety Act expressly preempted State environmental regulation. Id. at 30a, citing ANR Pipeline Co. v. Iowa State Commerce Commission, 828 F. 2d 465, 473 (8th Cir. 1987).⁴

In reversing the District Court's decision, the Court of Appeals relied primarily on the NGA and to a lesser extent, the Safety Act as evidence that Congress chose to entirely preempt regulation of the sort contemplated by the PSC under the provisions of State law. App. at 10a-14a. The court below endorsed National Fuel's argument "that Congress intended to vest

⁴ The Eighth Circuit stated: "Although the question is not before us, we note that [State] regulations concerning the environmental impact of pipeline construction are not specifically preempted by the language of either the [Safety Act] or the NGA. Thus, Iowa may be able to enact legislation to protect its valuable topsoil and other aspects of the environment, as long as the state regulations do not conflict with existing federal standards." 828 F.2d at 473 (footnote and citation omitted).

exclusive jurisdiction to regulate pipelines in the FERC", citing this Court's recent decision in Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988). Id. at 11a. Moreover, the court found that the potential for "conflict" between FERC's authority to certificate pipeline construction under the NGA and the NYPSC's environmental oversight under Article VII is sufficient to demonstrate federal preemption, Id. at 12a, and further, that the NYPSC is unable to take action to avoid such conflict by limiting its regulatory role under Article VII to matters not addressed by the FERC. Id. at 14a-17a. In essence, the Court of Appeals' preemption test is that any subject relevant to the construction or operation of an interstate pipeline which is suitable for decision by the FERC under the NGA is exclusively Federal, and therefore, beyond any State authority.

The NARUC respectfully submits that in

its analysis, the Court of Appeals has misconstrued the scope of Congressional preemption as it relates to the specific question raised in this case and precisely described by the District Court: "...whether federal law preempts a state from requiring an interstate pipeline company to seek environmental compatibility and local permit procurement at a state level." App. at 30a. As we now explain, in its review of National Fuel's facial attack on the NYPSC's jurisdiction, the Second Circuit erred in concluding that Congress had foreclosed all such State regulation through its enactment of the NGA.

As the Court of Appeals described, this Court has established a series of now-familiar tests to determine if Federal regulation under acts of Congress preempts State regulation.⁵ In its decision, the court addressed two "theories" of

⁵ App. at 9a-10a and cases there cited.

preemption: that the NGA vested "exclusive jurisdiction in the FERC to regulate natural gas pipelines used in interstate commerce," and that "Congress has fully occupied the field" that the NYPSC intends to regulate under Article VII. App. at 10a. The Court of Appeals' analysis is consistent with the District Court's conclusion that there are three ways for a court to determine whether or not Congress has chosen to restrict, direct or displace a State's exercise of its inherent police powers to regulate entities operating within its borders.⁶ Congress

⁶ Under our system of federalism, Congress does not authorize a State to exercise its police powers for the protection of its citizens; rather, State authority to regulate is inherent, and survives unless and until an act of Congress forecloses or restricts this power. While a State may not unduly burden interstate commerce, the authority it chooses to exercise over intrastate matters is grounded in its independent existence as a State, and not as a matter of federal authorization. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983), "...the regulation of utilities is one of the most important of the functions traditionally associated with

can explicitly and directly preempt an aspect of State regulatory authority, or it can pass a statute which comprehensively regulates a commercial or other activity, thereby "occupying the field" to the exclusion of any State power, or it can pass a statute which is not comprehensive, but whose provisions preempt the exercise of conflicting State requirements. App. at 28a-29a.⁷

In this case, there has been no finding by either the District Court or the Court of Appeals, nor could there be, that Congress

the police power of the States."

⁷ In a facial challenge to a State commission's "mere assertion of jurisdiction", as in the case at bar, the Supreme Court has been unwilling to consider as conflicts "hypothetical event[s]" in which State regulation might "compromise important federal interests". Importantly for the case at bar, in such a case, the Court has relied on State assurances that its regulatory body "can make no regulation...which conflicts with particular regulations promulgated by the [Federal agency]." Arkansas Electric Cooperative, supra, 461 U.S. at 389.

has enacted any statute which expressly preempts the State of New York from requiring that National Fuel seek environmental compatibility and local permit procurement from the NYPSC. Rather, the Court of Appeals based its preemption ruling on two grounds: "exclusive" Federal regulation of natural gas pipelines, and the possibility of conflicts between the imposition of Federal and State commands upon National Fuel's pipeline operations. App. at 10a. Specifically, the court below relied primarily upon FERC regulation of natural gas pipeline construction under section 7 of the NGA, 15 U.S.C. sec. 717f, as evidence that Congress intended to foreclose State environmental regulation. App. at 13a-14a.

As the District Court found, however, the NGA is not nearly as comprehensive as the Court of Appeals held, either in general or with respect to pipeline construction

projects. App. at 29a-32a. Simply put, despite the existence of the NGA, natural gas pipelines are regularly subject to regulation by entities other than FERC: retail sales of gas by a pipeline to an end user may be regulated by a State regulatory commission,⁸ the timing of the production of gas for sale to a FERC-regulated pipeline may be regulated by a State commission,⁹ and the interpretation of the contracts which pipelines negotiate with their suppliers is subject to State law applied by

⁸ Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951). "By this Act [the NGA] Congress occupied only a part of the field." 341 U.S. at 334. Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947).

⁹ Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 489 U.S. ___, 103 L.Ed.2d 509 (1989), noting "Congress' decision that the interstate natural gas industry should be subject to a dual [Federal/State] regulatory scheme." 489 U.S. at ___, 103 L.Ed.2d at 530.

State courts.¹⁰ This does not mean that the NGA is not preemptive, as this Court's decision in Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), clearly shows. Rather, the existence of permissible and valid State regulation, even over matters which go to the heart of pipeline economics such as rates for the direct sale of gas to consumers, gives clear evidence that through the NGA, Congress has not "comprehensively" regulated interstate pipelines to the exclusion of State power. By accepting National Fuel's argument that the NGA "vest[s] exclusive jurisdiction in the FERC to regulate pipelines used in interstate commerce," the Court of Appeals ignored this Court's contrary rulings. Therefore, this Court should grant review of the Court of Appeals' overbroad ruling to limit Federal regulation under the NGA to those matters

¹⁰ Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981).

intended by Congress.

**II. THERE IS NO CONFLICT BETWEEN
FERC AND NYPSC REGULATION WHICH
WOULD SUPPORT COMPLETE PREEMPTION
OF STATE ENVIRONMENTAL REVIEW**

Because "occupation of the field" preemption does not apply, the NYPSC's jurisdiction to regulate specific subject matter of this dispute -- the environmental impact of National Fuel's construction of a facility located entirely within the State of New York -- is only preemptible if it directly conflicts with the exercise of the regulatory authority of a Federal agency.¹¹ Given that Congress has not occupied the field of pipeline regulation

¹¹ In a facial challenge to State authority, such as in this case, "hypothetical events" not "likely to occur" are insufficient evidence of the sort of "conflict" necessary to displace State regulatory authority. Arkansas Electric Cooperative, supra, 461 U.S. at 389. Moreover, not every "effect" of State regulation upon activities regulated by the FERC under the NGA triggers "conflict preemption". Northwest Central Pipeline, supra, 489 U.S. at ___, 103 L.Ed.2d at 531.

nor directly foreclosed State regulation of this kind, this issue of first impression is the sole remaining question for analysis. For at least three reasons, it is clear that contrary to the Court of Appeals decision, App. at 12a-18a, the New York program of environmental regulation can exist compatibly with all Federal regulatory requirements.

First, and most importantly, the New York statute at issue herein--Article VII--was written to preclude Federal/State conflicts. As the District Court described, Section 121(4)(c) of Article VII "states that it will not apply to any pipeline or facility over which the federal government has jurisdiction to the extent that federal jurisdiction is exercised to the exclusion of state jurisdiction." App. at 31a, citing California Coastal Commission v. Granite

Rock Company, 480 U.S. 572 (1987).¹² As the Supreme Court determined in Arkansas Electric Cooperative, supra, a State's recognition that it may not implement its regulations in a manner which conflicts with Federal regulation is an important factor in preserving the State regulatory program from Federal preemption, particularly in the case of a facial attack on the State commission's statutory authority. 461 U.S. at 389.

Second, the Federal agency whose jurisdiction is supposedly preemptive--the FERC--has promulgated regulations for the issuance of pipeline certificates (necessary for the abandonment, construction or extension of pipeline facilities) which require that a petitioning pipeline identify, inter alia, "State...safety and health regulations and codes which must be complied with in the construction,

¹² Section 121(4)(a) appears at App. 50a.

maintenance, and operation of the proposed project." 18 C.F.R. Part 380, Appendix A, Section 9.2 (1988) (App. at 154a, emphasis supplied). In addition, FERC regulations include a catch-all provision which requires a pipeline to identify all other State laws to which a pipeline project may be subject. 18 C.F.R. Part 380, Appendix A, Section 9.3 (1988) App. at 154a.¹³ That these sections of the Federal Commission's regulations dealing directly with the matter at hand--environmental compliance--even exist provides clear evidence that the FERC has not construed its jurisdiction over pipeline construction to be comprehensive to the exclusion of State regulation, or that

¹³ Appendix A to Part 380 is entitled "Guidelines for the Preparation of Environmental Reports for Applications Under the Natural Gas Act, as Specified in Section 380.3 of the Commission's Regulations." Section 380.3 of these regulation includes a subparagraph (b)(4) which directs applicants to "[s]ubmit applications for all Federal and State approvals as early as possible in the planning process." 18 C.F.R. sec. 380.3 (b)(4) (App. at 124a, emphasis supplied).

State and local environmental requirements will inevitably conflict with FERC's own regulatory responsibilities. If, as the Court of Appeals held, there were no room for State regulation, these provisions would be irrelevant, unnecessary and unlawful.¹⁴

Finally, the one Court of Appeals that has considered the relationship of State environmental requirements to pipeline construction activities concluded, albeit in dicta, that a State may enact "environmental regulations applicable to interstate pipelines" and provide "remedies for its citizens whose property is damaged during pipeline construction" without running afoul

¹⁴ The fact that FERC has issued these regulations is an important indication of the preemptive scope of the statute. Were FERC defending the lawfulness of these regulations against a preemption challenge, its construction of the NGA to require pipelines to "submit applications for all ... State approvals" (Sec. 380.3(b)(4)) would be entitled to judicial deference under the Chevron standard, given that the statute is silent on preemption of State environmental regulation. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-843 (1984).

of the express provisions of the NGA or the Safety Act. ANR Pipeline, supra, 828 F.2d at 473. More importantly, the Eighth Circuit held, in reliance upon a decision by the U.S. Court of Appeals for the Fourth Circuit,¹⁵ that a State may impose safety inspection fees on pipeline construction, including sanctions for nonpayment, as long as such fees do not conflict with Federal requirements. Id. at 474, n. 8. Indeed, such State fees, if reasonable and related to safety inspections of pipeline construction, were found to "further the purpose of the federal statute." Id.

In sum, Congress has not occupied the field of environmental regulation of pipeline construction, and in its facial challenge to New York law, National Fuel has been unable to prove actual conflict with any Federal requirement or policy. Rather,

¹⁵ Tenneco, Inc. v. Public Service Commission, 489 F.2d 334 (4th Cir. 1973).

as in the case of the pipeline inspection fees upheld in ANR Pipeline, supra, New York's environmental regulations "further the purpose" of Federal requirements. The evidence is the FERC's own regulations which not only assume, but anticipate, that State and local environmental requirements will be fully applicable to pipeline applications under the NGA, including applications for pipeline construction under section 7 of the NGA, 15 U.S.C. sec. 717f.

Therefore, given the State's express willingness to apply its regulations in a manner compatible with Federal requirements, this Court should review the ruling of the Court of Appeals in order to preserve the NYPSC's lawful jurisdiction to ensure environmentally compatible pipeline construction.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the Court grant the NYPSC's Petition for Writ of Certiorari.

Respectfully submitted,

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